

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

92-100

In re:)
)
Petition by In-Flight Phone Corp.)
for Acceptance of Application Or,)
Alternatively, Waiver of)
Section 1.402(c) of the Rules To)
Permit Consideration of an)
Application for Pioneer's)
Preference for Airline Audio)
Service in the 900 MHz Band)

ET Docket No. 92-100-94-32
PP -

RECEIVED

FEB - 9 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

REPLY TO COMMENTS OF PACTEL PAGING AND
OPPOSITION OF CLAIRCOM COMMUNICATIONS

In-Flight Phone Corp. ("In-Flight") hereby replies to separate requests by PacTel Paging and Claircom Communications that the FCC dismiss In-Flight's application for a pioneer preference in the licensing of narrowband PCS.^{1/} The Commission should reject these requests for the reasons discussed below.

SUMMARY

Last spring, the Commission set a deadline for filing pioneer preference applications for narrowband "data or paging services" operating on any of three specified bands in the 900 MHz range. It did not set a deadline, however, for filing preference applications

^{1/} See "Comments of PacTel Paging" (Jan. 26, 1993), and Claircom's "Opp. to Pet. for Acceptance of Applic. or Rule Waiver and Limited Opp. to Applic. for Pioneer's Pref." (Feb. 3, 1993). The PacTel and Claircom filings respond to an In-Flight petition requesting that the Commission accept the In-Flight preference application. See "Pet. for Acceptance of Applic. or Rule Waiver" (Oct. 30, 1992).

No. of Copies rec'd
LH:BCDE

248

for any other narrowband service operating on these specified bands.

Shortly after the "data or paging services" filing deadline had expired, the Commission issued a notice of proposed rulemaking in which it proposed to create regulations governing narrowband PCS. The agency defined narrowband PCS as "[any] type[] of voice or data offering" other than broadcasting that operates on the same three 900 MHz bands as the narrowband "data or paging services" to which the agency's preference application deadline had applied. While narrowband "data" or "paging" services plainly are included within this definition of narrowband PCS, other services are included as well, but the FCC did not set a deadline for filing pioneer preference requests for any of these other services.

After the Commission proposed to establish rules governing narrowband PCS, In-Flight filed an application seeking a pioneer preference to provide, on two of the narrowband PCS bands, a service in which airline passengers may receive multiple channels of audio programming. In-Flight had obtained an experimental license to provide this service several months earlier, and it had begun immediately to design the hardware and software necessary to provide this service. As indicated, In-Flight filed the preference application after the notice of proposed rulemaking was issued defining narrowband PCS; the date In-Flight submitted its preference application also was after the deadline for filing preference applications involving narrowband "data or paging services".

In a petition accompanying its preference application, In-Flight asked the Commission to accept the application as timely filed on the ground that the agency had not set a deadline for an application seeking a preference for a narrowband PCS service other than "data or paging services". Alternatively, out of an abundance of caution In-Flight also asked the agency to accept In-Flight's application by waiving the filing deadline on the ground that doing so would not undermine the public policy which a filing deadline for a pioneer preference is designed to serve.

PacTel and Claircom both ask the Commission to dismiss In-Flight's preference application on entirely procedural grounds. Both objectors claim that the application should have been filed by the deadline which was set for "data or paging services". PacTel asserts that this deadline was applicable because In-Flight's service is a "data" service even though the service plainly is not a "data" service as shown below. Claircom, by contrast, argues falsely that the notice which established the filing deadline established a deadline for "all. . . . specific new spectrum-based service[s] or technology[ies]." This contention by Claircom is preposterous on its face. In addition, both objectors ask the Commission not to grant In-Flight a waiver of the filing deadline even though neither objector disputes any of the evidence that In-Flight presented to justify a waiver. Instead, both raise arguments in opposition to waiver that are red herrings as shown below. Finally, PacTel has the audacity to urge that the Commission violate its own rules by dismissing In-Flight's

preference application on procedural grounds even if the agency agrees with In-Flight that the application was filed strictly in accordance with all agency procedures. Merely restating this argument is sufficient to prove that it is ridiculous, but a more detailed discussion is presented below.

The assertions of PacTel and Claircom in support of their request for dismissal of the In-Flight application are so patently frivolous as to expose the objectors' own selfish motivations. Claircom in particular, which has an FCC license to compete with In-Flight in In-Flight's core air-ground communications business, plainly is engaged in a crude effort to persuade the FCC to handicap In-Flight. Claircom is worried that it may suffer in the marketplace because it knows that next month In-Flight plans to demonstrate its multi-channel audio programming service after spending nearly \$5 million to develop the service, and Claircom's last hope is that it can convince the FCC to make it difficult for In-Flight to get a permanent license to provide this service.

DISCUSSION

I. In-Flight's Preference Application Was Not Filed Late

While PacTel and Claircom each ask the Commission to dismiss In-Flight's preference application on the ground that it was late-filed, each makes a different argument to support this request. As shown below, however, neither argument is valid.

A. In-Flight's Proposed Audio Information Service
Is Not a Data Service" as PacTel Claims

PacTel argues that solely because In-Flight's proposed narrowband PCS service involves the transmission of "information", it is a "data service" to which the FCC's filing deadline for narrowband "data or paging services" applied.^{2/} According to PacTel, In-Flight's preference application should be dismissed since it was filed after that deadline.

While In-Flight's service obviously involves the transmission of information, the Commission may not lawfully hold that this renders it a "data service" because this would be inconsistent with the longstanding requirement that statutes and agency rulings must be interpreted in a way that gives meaning to every word they contain.^{3/} Since the FCC's public notice established a filing deadline for both "data services" and "paging services," the agency cannot now hold that a communications service is a "data service" if the service involves the transmission of "information" because this would render the term "paging service" meaningless given that paging service (indeed every communications service) also involves the transmission of information.

A holding that all communications services are "data services" also would violate the rule that the FCC cannot change the definition of a term without warning and then apply that changed

^{2/} "Comments of PacTel Paging" at 6-7.

^{3/} See, e.g., U.S. v. Powers, 307 U.S. 214, 217 reh. den. 308 U.S. 631 (1939); McDonald v. Thompson, 305 U.S. 263, 266, reh. den. 305 U.S. 676 (1939).

definition to a party who had relied in good faith on the previous definition if that party would be hurt.^{4/} The FCC consistently has distinguished "data services" from other communications services rather than holding that all services are data services as PacTel proposes.^{5/} In-Flight relied in good faith on this consistent usage and plainly would be hurt seriously if a new definition is applied to it under which all communications services constitute "data services".^{6/}

^{4/} See, e.g., *Retail, Wholesale and Dept. Store Union v. NLRB*, 466 F.2d 380, 388-91 (D.C. Cir. 1972).

^{5/} For example, the Commission has distinguished data services from other categories of communications service in its so-called price-cap regulations. See *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786, 6811 (1990). Likewise, the Commission differentiated data services from other communications services last year when it adopted different regulations for the provision of "facsimile or data services" by public coast stations than for the provision of other communications services by these stations. See *Amendment of Part 80 of the Commission's Rules to Permit the Use of Facsimile and Data Emissions in Marine Pub. Carres. Channels in the 156-162 MHz Band*, 7 FCC Rcd. 5542 (1992). Similarly, it distinguished data services from other services in 1989 when it authorized AT&T to use certain equipment in order to provide specific voice services but deferred a decision about whether AT&T could use this same equipment in order to provide data services. See *Am. Tel. and Tel. Co. Comparably Efficient Interconn. Plan for Enhanced Services Complex*, 4 FCC Rcd. 6974 (1989). See also *Fonorola Corp.*, 7 FCC Rcd. 7312 (1992) (distinguishing data services from certain other services by restricting an international carrier to the provision of "international fixed voice, facsimile and data services"); *Brown Univ.*, 7 FCC Rcd. 5523 (1992) (distinguishing data service from other services by restricting a carrier to the provision of "two-way digital compressed video teleconferencing service, as well as digital data service").

^{6/} PacTel is disingenuous when it compares the news service it offers to its paging customers with the news and information service that In-Flight proposes. See "Comments of PacTel Paging" at 6 n.13. PacTel's service plainly is a "data or paging service" since the service allows PacTel paging customers to access a PacTel

(continued...)

B. The FCC's Public Notice Setting a Filing Deadline for "Data or Paging Services" Did Not Set a Deadline for All Other Services "Relating to a Specific New Spectrum-Based Service or Technology" as Claircom Asserts

Claircom also asks the Commission to dismiss In-Flight's application on the ground that it was late-filed, but rather than claiming that In-Flight proposes a "data service", Claircom asserts that the public notice establishing the deadline, by its terms, applied to all communications services. According to Claircom, the public notice "makes clear that the [filing] deadline applied to all pioneer's preference requests 'relating to a specific new spectrum-based service or technology'."⁷

In fact, the public notice sets a filing deadline only for narrowband "data or paging services" as even PacTel admits, and Claircom's effort to distort the language in the notice in order to reach another conclusion borders on an abuse of process. The FCC, in the language which Claircom quotes, did not purport to describe the services to which the deadline applies. Instead, the language describes the FCC's authority to establish filing deadlines, as is

⁶ (...continued)
database with their alphanumeric pagers and obtain a readout of the selected data on the screen of their pagers. In-Flight's service, by contrast, allows airline customers to receive continuous broadcast-quality audio transmissions of news and information programming.

⁷ "Opp. of Claircom" at 11.

clear when the paragraph in which the language appears is read in its entirety:

"This action [establishing a filing deadline for narrowband data or paging services] is taken pursuant to Section 1.402(c) of the Commission's Rules, as amended by the Memorandum Opinion and Order to GEN Docket No. 90-217, 7 FCC Rcd 1808 (1992). As amended, Section 1.402(c) states that the Commission will announce by public notice a date after which pioneer's preference requests relating to a specific new spectrum-based service or technology will not be accepted."^{2/}

II. Even if the FCC Somehow Were to Conclude that In-Flight's Application Were Filed Late, PacTel and Claircom Have Failed Totally to Rebut In-Flight's Showing that a Waiver of the Filing Deadline is Justified

Although it should be plain from the discussion above that In-Flight's preference application was not filed late, In-Flight, out of an abundance of caution nonetheless sought a waiver of that filing deadline in the petition which accompanied its application. In support of waiver, In-Flight showed that the FCC's stated reason for adopting a rule that establishes the procedures by which filing deadlines can be set was to ensure that preferences are granted only to those who substantially developed an innovative service before they knew that the FCC would adopt rules governing the service; In-Flight demonstrated that this policy would be preserved if a waiver were granted to it since a substantial amount of work necessary to develop In-Flight's service occurred prior to the application filing deadline.^{2/}

^{1/} FCC Pub. Notice, Mimeo No. 22922 (Ap. 30, 1992).

^{2/} See "Pet. for Acceptance of Applic. or Rule Waiver" at 7-10.

In their comments, neither PacTel nor Claircom disputes In-Flight's contention that the FCC's stated reason for adopting its filing deadline rule would not be undermined if a waiver were granted to In-Flight since In-Flight had undertaken substantial development work prior to the relevant filing deadline.^{10/} Nor do PacTel or Claircom assert that any future late-filer would be able successfully to make a similarly strong showing that the service for which it seeks a licensing preference was developed prior to the relevant filing deadline.^{11/}

Although neither PacTel nor Claircom challenges the facts presented by In-Flight to support waiver, each nonetheless opposes a waiver, but the reasons each gives are factually inaccurate as shown below.

A. Notwithstanding PacTel's Contention to the Contrary, It Would Not Be Difficult for the FCC To Set Filing Deadlines in the Future For Broad Categories of Service If that is What It Wants To Do

PacTel pleads with the Commission not to waive the filing deadline on the ground that a waiver would eviscerate the FCC policy of establishing deadlines for preference applications because it would allow late filing applicants to propose a communications service with characteristics not within the literal definition of the service to which the filing deadline applies; according to PacTel it is not possible for the agency to define

^{10/} See generally, "Comments of PacTel Paging" at 8-1; "Opp. of Claircom" at 12-13.

^{11/} Id.

clearly in the notice creating a filing deadline the category of services to which the deadline applies.^{12/}

PacTel's contention is ridiculous that the Commission cannot define clearly in the public notice that establishes a filing deadline for pioneer preference applications the category of services to which that deadline applies. The Commission easily can do this by defining the service broadly in the public notice and then using the same words to define the service in the notice of rulemaking recommending a regulatory structure to govern that new service. In the present case, the notice establishing the filing deadline defined narrowband services much more narrowly than did the subsequently issued notice of proposed rulemaking. The FCC's action in this regard is the only reason for the controversy here.

B. A Waiver Would Not Cause Severe Administrative Inconvenience and Delay as Claircom Contends

Claircom asserts that the filing deadline should not be waived in this case because a waiver (a) would be "grossly unfair to the parties that filed timely pioneer's preference requests" and of secondary importance (b) would "cause severe administrative inconvenience and delay".^{13/}

It may be easy for Claircom to assert that a waiver would be "grossly unfair" to the parties who filed their preference applications for narrowband service on time, but the company offers no basis to believe that a waiver would produce such unfairness,

^{12/} "Comments of PacTel Paging" at 8-11.

^{13/} "Opp. of Claircom" at 13.

and In-Flight does not believe it would be unfair to any of these filers since the pioneer preference process is not a comparative process. Indeed, the Commission already tentatively has granted the preference application of one of these filers and tentatively has denied the preference applications of all others.^{14/} Moreover, although Claircom admits its contention is only of secondary importance that a waiver would cause "severe administrative inconvenience and delay", Claircom offers no basis for this belief, and there is, in fact, no basis for this belief.

III. The Commission Cannot Lawfully Dismiss In-Flight's Application If it Concludes that the Filing Deadline Applicable to "Data or Paging" Services Was Inapplicable to In-Flight's Proposed Service

PacTel asks the Commission to dismiss In-Flight's application even if the agency finds that In-Flight's service is not a communications service to which the agency's filing deadline applied. According to PacTel, in order to promote administrative efficiency the Commission should accept an application for a pioneer preference only if it is filed prior to issuance of the notice of rulemaking which proposes establishment of the communications service to which the application relates even if the agency did not establish a filing deadline for the kind of service the application proposes.^{15/}

Dismissing In-Flight's application in order to promote administrative efficiency notwithstanding the absence of a filing

^{14/} See Notice of Prop. Rulemaking, 7 FCC Rcd. 5676, 5735-39 (1992).

^{15/} Id. at 7-8.

deadline for the application would be inconsistent with Section 1.402(c) of the Commission's own Rules, and the FCC may not lawfully ignore this rule merely because it somehow could be administratively advantageous to do so. As In-Flight already has explained, Section 1.402(c), on its face, requires the agency to accept all preference applications that are filed prior to any deadline established by the Commission. The agency has no authority to ignore this rule in any individual situation merely because doing so might promote administrative efficiency in some way.^{19/}

CONCLUSION

Contrary to what PacTel claims in its Comments, In-Flight's pioneer preference application was not filed late because the narrowband PCS service that In-Flight has developed is not a data service to which the FCC's filing deadline applied. Nor did the FCC's public notice establish a filing deadline for other

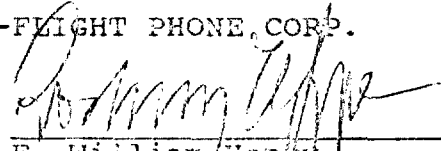
^{19/} See "Pet. for Acceptance of Applic. or Rule Waiver", supra, at 6-7. Claircom also claims In-Flight's preference application should be dismissed because the service for which In-Flight seeks a preference is "broadcasting" which is ineligible for a narrowband PCS preference under the FCC's proposed rules governing narrowband PCS. "Opp. of Claircom" at 7-8. The only thing Claircom says to support its view that In-Flight's service is "broadcasting" is that In-Flight itself has stated that some of the programming provided by the service may be retransmitted from over-the-air broadcasting stations. Id. In-Flight already has explained why the service it proposes is not broadcasting. See "Reply of In-Flight Corp. to Opp. of Telocator" (Dec. 22, 1992). Moreover, Claircom's implicit assertion that any entity which retransmits broadcast programming is itself engaged in broadcasting is so preposterous that it does not merit a response. In any event, In-Flight intends not only to provide airline passengers with programming from broadcast stations, but also to provide passengers with programming that is not retransmitted from broadcast stations.

narrowband services as Claircom asserts. Even if In-Flight's service were a data service to which the filing deadline applied, the filings of Pactel and Claircom make clear that the Commission could waive that deadline in this case without undermining its general policy that preference applications must be filed by specified deadlines.

Respectfully submitted,

IN-FLIGHT PHONE CORP.

By



E. William Henry

Rodney L. Joyce

Sinsburg, Feldman and Bress

125 Connecticut Ave., N.W.

Washington, DC 20036

(202) 637-9005

Its Attorneys

William J. Gordon
V.P. Regulatory Affairs
In-Flight Phone Corp.
1146 19th Street, N.W., Suite 200
Washington, D.C. 20036

February 9, 1993

CERTIFICATE OF SERVICE

I certify that a copy of the attached "Reply to Comments of Pactel Paging and Opposition of Claircom Communications" was mailed by first class mail to each of the following on February 9, 1993:

Carl W. Northrop, Esq.
Bryan Cave
700 13th St., N.W., Suite 700
Washington, DC 20005
(Counsel for Pactel Paging)

Tom W. Davidson, Esq.
Akin, Gump, Hauer & Feld
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(Counsel for Claircom Communications Group)



Rodney L. Joyce